Supreme Court, U. S.
FILED
JUL 13 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75–1678

FEDERAL POWER COMMISSION,
Petitioner

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *et al.*

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR PIEDMONT NATURAL GAS COMPANY, INC., PUBLIC SERVICE COMPANY OF NORTH CAROLINA, AND NORTH CAROLINA NATURAL GAS CORPORATION *AMICI CURIAE* IN OPPOSITION

DALE A. WRIGHT
1050 17th Street, N.W.
Suite 600
Washington, D.C. 20036

JERRY W. AMOS
P.O. Drawer U
Greensboro, N.C. 27402

Of Counsel for
Piedmont Natural Gas Co., Inc.

F. KENT BURNS
P.O. Box 1406
Raleigh, N.C. 27602

Of Counsel for
Public Service Company of North Carolina

MELVIN RICHTER
LITTMAN, RICHTER, WRIGHT & TALISMAN, P.C.
1050 17th St., N.W. Suite 600
Washington, D.C. 20036

Attorney for:
Piedmont Natural Gas Company, Inc.
Public Service Company of North Carolina and North Carolina Natural Gas Company

DONALD W. McCOY
222 Maiden Lane
P.O. Box 1688
Fayetteville, N.C. 28302

Of Counsel for
North Carolina Natural Gas Corp.

July 14, 1976

DI CESARE - Printing – 331-8101 – Washington, D.C. 20006

TABLE OF CONTENTS

Page

AMICI 2

INTEREST OF AMICI 3

QUESTION PRESENTED 4

ARGUMENT 5

I. THE COMMISSION'S BROAD CURTAILMENT AUTHORITY EXTENDS TO THE INCLUSION OF COMPENSATION PROVISIONS 6

II. COMPENSATION PROVISIONS ARE NOT PROHIBITED BY THE RATE OR CERTIFICATE PROVISIONS OF THE ACT 12

A. Compensation Provisions Do Not Involve "Rates" Within Sections 4 and 5 12

B. Compensation Provisions Do Not Constitute "Sales" Requiring Certificates Under Section 7 or Tariff Filings Under Section 4 15

III. COMPENSATION PROVISIONS MITIGATE RATHER THAN FOSTER DISCRIMINATION 16

CONCLUSION 19

CASES CITED

	Page
Alabama-Tennessee Natural Gas Co., 31 FPC 208 (1964), *affirmed*, 359 F.2d 318 (5th Cir. 1966), *cert. denied*, 385 U.S. 847 (1966) . . .	9
Arkansas Louisiana Gas Company, 49 FPC 53 (1972)	5
Colorado Interstate Gas Co. v. F.P.C., 324 U.S. 581 (1945)	14
Columbia Gas Transmission Company, 48 FPC 647 (1972)	5
Consolidated Edison Co. v. F.P.C., 511 F.2d 372 (D.C. Cir. 1974)	11
El Paso Natural Gas Co., 51 FPC 2053 (1974) . . .	14
FPC v. Louisiana Power & Light Co., 406 U. S. 621 (1972)	5, 6, 7, 12
FPC v. Transcontinental Gas Pipe Line Corporation, 423 U.S. _____ , 96 S.Ct. 579 (1976) . . .	3
Lindheimer v. Illinois Bell Telephone Co., 292 U.S. 151 (1934)	19
Mississippi Power & Light Co. v. United Gas Pipe Line Co., 532 F.2d 412, (5th Cir. 1976) . . .	4
Mobil Oil Corp. v. FPC, 463 F.2d 256 (D.C. Cir. 1972), *cert. denied*, 406 U.S. 976 (1972) . . .	13
Panhandle Eastern Pipeline Co., 46 FPC 1142 (1971); 47 FPC 1567 (1972)	14

Rhode Island Consumers' Council v. FPC, 504 F.2d 203 (D.C. Cir. 1974) 11

Transcontinental Gas Pipe Line Corporation, 46 FPC 1212 (1971) 5

Transcontinental Gas Pipe Line Corporation, 48 FPC 1060 (1972) 5

Transcontinental Gas Pipe Line Corporation, Docket No. RP72–99, orders issued November 12, 1974 and January 10, 1975 3

Transcontinental Gas Pipeline Corporation, et al. v. FPC, D.C. Cir. No. 74–2036, *et al.* 3

United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392 (1965) 13

United Gas Pipe Line Company, 46 FPC 786 (1971) 13

United Gas Pipe Line Company, 50 FPC 1348 (1973) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75–1678

FEDERAL POWER COMMISSION,
Petitioner,

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *et al.*

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR PIEDMONT NATURAL GAS COMPANY, INC., PUBLIC SERVICE COMPANY OF NORTH CAROLINA, AND NORTH CAROLINA NATURAL GAS CORPORATION *AMICI CURIAE* IN OPPOSITION

Piedmont Natural Gas Company, Inc., Public Service Company of North Carolina, and North Carolina Natural Gas Corporation (North Carolina Distributors) having obtained the consent of all the active parties pursuant to Rule 42 of this Court, hereby submit this brief *amici curiae* in opposition to the petition for writ of certiorari filed herein by the Federal Power Commission.

AMICI

The North Carolina Distributors are three of the major distributors of natural gas in North Carolina. Piedmont owns and operates under franchises natural gas distribution systems in 60 cities, towns and communities in the Piedmont area of North Carolina and South Carolina with an aggregate population of approximately 1,300,000. Among the 42 North Carolina communities served are Charlotte, Winston-Salem, Greensboro, Burlington, High Point, Salisbury, Hickory, Lincolnton, and Morganton. Piedmont serves approximately 156,000 residential customers, about 20,000 commercial customers and about 1,100 industrial customers.

Public Service Company owns and operates under franchises natural gas distribution systems in some 75 cities, towns and communities in central and western North Carolina with an aggregate population of 900,000. Among the communities served by it are Raleigh, Durham, Concord, Statesville, Gastonia and Asheville. It serves about 105,000 residential customers, 18,000 commercial customers and about 700 industrial and other customers.

North Carolina Natural owns and operates under franchises natural gas distribution systems in some 55 cities, towns and communities in 27 counties in southern and eastern North Carolina with an aggregate population of about 1,500,000. Among the North Carolina communities served are Waynesboro, Fayetteville, Wilmington, Goldsboro, Newbern and Fort Bragg. North Carolina Natural serves about 65,000 residential customers, 6,400 commercial customers and 280 industrial customers.

INTEREST OF AMICI

The instant proceeding raises question as to the authority of the Federal Power Commission to include compensation provisions in natural gas curtailment plans made necessary by the intensifying shortage of that premium fuel. The Commission's denial of such authority in the instant proceeding was based on reasoning which it previously invoked in support of similar denial in the curtailment proceeding in *Transcontinental Gas Pipe Line Corporation* (Transco), Docket No. RP72-99. See orders issued November 12, 1974 and January 10, 1975, in that proceeding (Pet. App. G, pp. 37a-72a; Pet. App. H, pp. 73a-102a, respectively).[1]

On appeal, the Court of Appeals for the Fifth Circuit set aside the Commission's self-denial of such authority and remanded the case for further proceedings in light thereof. The Commission's petition seeking review of that ruling of the Court of Appeals reiterates and relies heavily upon orders and opinions issued in the Transco proceedings.

The North Carolina Distributors buy all the gas distributed by them in North Carolina from Transco and have been active in the litigation before the Commission and the Courts with regard to the Commission's authority to approve compensation provisions in the curtailment plan involved in the Transco controversy. The North Carolina Distributors and

---

[1] Although the Commission's orders in the Transco proceeding were issued before its orders in the instant proceeding, and judicial review was sought of these orders (see *Transcontinental Gas Pipe Line Corporation, et al. v. F.P.C.*, D.C. Cir. No. 74-2036, *et al.*), the Court of Appeals *sua sponte* raised questions as to the existence of a natural gas supply shortage (see order issued August 1, 1975 vacated by this Court on January 19, 1976; see *F.P.C. v. Transcontinental Gas Pipe Line Corporation*, 423 U.S. , 96 S.Ct. 579 (1976). As a result, the question as to compensation authority in the Transco proceeding is pending undecided before the Court of Appeals.

their ultimate consumers have a substantial interest in the funds which have been collected under the curtailment plan involved in Transco litigation and which are being held in escrow pending resolution of the Commission's authority in this regard.

Since it is thus clear that the Court's action in the instant case might affect the resolution of the compensation issue in the Transco litigation, it is apparent that the North Carolina Distributors are vitally interested in, and may be affected by, the Court's disposition of this question in the instant proceeding.

QUESTION PRESENTED

The Commission's statement of the question presented (Pet., p. 2) exceeds the holding of the Court of Appeals. While the court below held that the Commission's curtailment authority extended to the inclusion of compensation provisions as part of a pipeline curtailment plan, it expressly refrained from "intimat[ing any] view one way or the other as whether compensation should be included" in the particular plan before it (Pet. App., p. 12a).[2] As recently summarized by the Court of Appeals[3] its holding in the instant case.

[2] "Our review of the Commission's decision is guided by the principle that, while we may not order the Commission to exercise its discretion in a particular way, we may order the Commission to consider a matter that is within the jurisdiction if such be the case" (Pet. App., p. 8a).

In this regard it should be noted that there is a variety of situations in which compensation provisions are appropriate to mitigate the economic impact of curtailment. It is not limited to the situation set forth in the question as formulated by the Commission. See *infra*, pp. 8-12.

[3] *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 417 (5th Cir. 1976).

> "rejected the Commission's jurisdictional argument and remanded for determination of whether compensation payments should be a condition for receipt of a higher priority in a gas curtailment plan."

The question presented, accordingly, is that of power alone, *i.e.*, whether the Commission's authority with regard to curtailment extends to the inclusion of compensation provisions in a pipeline curtailment plan in appropriate circumstances.

ARGUMENT

This case presents an unusual situation, in that it is the Commission which is urging that it lacks authority regardless of the pertinent facts and circumstances to include compensation provisions in natural gas curtailment plans subject to its jurisdiction and which is seeking review of the contrary holding of the Court of Appeals.[4] As noted by the Court of Appeals, the Commission's insistence that it lacks such authority reflects a rejection of the broad responsibilities with respect to natural gas curtailment, as outlined by this Court in *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), and is based on strained and contrived reasoning

[4] The Commission's present position was first enunciated in its November 12, 1974 and January 10, 1975 orders in the Transco proceeding. See *supra*, p. 3. Prior to that time, the Commission had not only sanctioned such compensation provisions (see, *e.g.*, *Transcontinental Gas Pipe Line Corporation*, 46 FPC 1212 (1971); *Transcontinental Gas Pipe Line Corporation*, 48 FPC 1060 (1972); *Columbia Gas Transmission Company*, 48 FPC 647 (1972)), but has expressly recognized that such provisions are in the public interest to mitigate "the severe economic dislocation which curtailment can cause" (*Arkansas Louisiana Gas Company*, 49 FPC 53, 64 (1972)).

wholly at odds with the necessities for dealing with the great variety of problems resulting from pipeline curtailment.[5]

The Court of Appeals thus properly rejected the Commission's sweeping denial of authority, leaving for Commission determination whether the inclusion of compensation provisions was appropriate in the particular case. Moreover, while the Commission's assertion of general importance is predicated on the claim that the compensation issue is presented in a number of cases, the fact is that the instant case constitutes the only *court* decision on the matter and the additional cases referenced by the Commission (Pet., p. 10, fn. 4) reflect the several instances in which the Commission has insisted upon its erroneous view. Accordingly, leaving the decision below standing without further review should be sufficient as a practical matter to put the question to rest and there is no occasion for further review by this Court.

I. THE COMMISSION'S BROAD CURTAILMENT AUTHORITY EXTENDS TO THE INCLUSION OF COMPENSATION PROVISIONS

Although the Commission totally ignores the relevance of *Louisiana Power & Light* to the basic question here involved,[6]

---

[5] Characterizing the Commission's present position as "approach[ing the problem] in reverse" (Pet. App., p. 9a), the court below noted (Pet. App., pp. 9a-10a):

> "* * * The asserted lack of jurisdiction is not because there is no statutory basis for compensation, but rather because there are effects of compensation as well as provisos within the Natural Gas Act that cumulatively preclude the implementation of compensation."

[6] The Commission's only reference to *Louisiana Power & Light* is in support of the thesis that the Commission may require curtailment plans to focus "on end-use rather than contractual entitlements" (Pet. pp. II, 16).

that case, as the Court of Appeals properly held, clearly is dispositive of the problem:

> "It seems plain * * * that the Commission is vested with both jurisdiction and broad power to solve the problems caused by curtailment." (Pet. App., p. 9a).

As the Court will recall, *Louisiana Power & Light* involved the Commission's curtailment authority with respect to direct sale of natural gas over which it had no rate jurisdiction. In there holding that the Commission's curtailment authority extends to such direct sales, the Court expressly noted that "[f]rom a practical point of view, [a contrary holding] may * * * produce a seriously inequitable system of gas distribution" (406 U.S. at 632) and that state authority could not "practicably regulate in this area to prevent this inequity and hardship" (*Id.* at 632-3).

Accordingly, as the court below observed (Pet. App., pp. 8a-9a), the Court there not only ruled that "the Commission must possess broad powers to devise effective means to meet these responsibilities" (*Id.* at 642), but it went on to hold – after pointing out that "[t]he substantive standard governing FPC evaluation of curtailment plans is found in Section 4(b) of the Act" (*Ibid.*) relating to discrimination – that (*Ibid.*):

> "* * * FPC and other agencies created to protect the public interest must be free, 'within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.' *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942). Section 16 of the Act assures the FPC the necessary degree of flexibility * * *.
>
> "In applying this section, we have held that 'the width of administrative authority must be measured in part by the purposes for which it was

> conferred * * *. Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority." *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968); see *United Gas Pipe Line Co. v. F.P.C.*, 385 U.S. 83, 89-90 (1966).[7]

Application of the Commission's so-called end-use approach for allocating limited gas supplies plainly may result in situations in which compensation provisions are appropriate and, indeed, necessary, in order "to prevent * * * inequity and hardship;" accordingly, such provisions obviously fit within "a generous construction of the Commission's statutory authority." (406 U.S. at 632, 642)

By way of background, it should be noted that since natural gas has developed into one of the major sources of

---

[7]In *Permian*, this Court observed (390 U.S. at 776):

"This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred; see, *e.g.*, *Piedmont & Northern R. Co. v. Comm'n*, 286 U.S. 299; *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 193-194; *National Broadcasting Co. v. United States*, 319 U.S. 190; *American Trucking Assns. v. United States*, 344 U.S. 298, 311. Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority.[40]

---

[40]We obtain additional assistance from §16; it provides that the Commission 'shall have power to perform any and all acts, and to prescribe . . . such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. 15 U.S.C. §717o.'"

fuel and raw material on the premise, *inter alia*, that it would remain in plentiful supply into the indefinite future,[8] distributing companies,[9] such as the North Carolina Distributors, have invested large sums of money in distribution and supplemental gas supply facilities. Since the natural gas business is heavily capital intensive, such investments are literally tremendous, aggregating several billions of dollars.

With, however, the onset of gas supply deficiencies and the concomitant reductions in the available gas supply, the distributors as well as the pipelines were confronted with a situation in which they could no longer make the sales to which they had become accustomed and for which they had become equipped. The reduction in sales thus made necessary had a cumulative effect, on the one hand, of creating excess capacity with concomitant heavily financial obligations, and, on the other hand, of reducing the level of sales with which to obtain the revenues needed to satisfy these obligations. Accordingly, in order to meet its financial obligations, a

---

[8]For example, in *Alabama-Tennessee Natural Gas Co.*, 31 FPC 208 (1964), affirmed, 359 F.2d 318 (5th Cir. 1966), *cert. denied*, 385 U.S. 847 (1966), the Commission pointedly observed (31 FPC at 218):

> "We do not dispute the contention that economically extractable gas reserves will suffer exhaustion at some indeterminate future date. However, we know of no reliable claim that such exhaustion of gas supplies is certain or even probable within this century. The fact that our gas reserves may be exhausted in the 21st century certainly does not establish that there is a present need for additional normalization."

[9]We have cast our discussion in terms of the problems confronting distributing companies as a result of curtailment, because that is the area of primary concern to the North Carolina Distributors and with which they are most familiar. It is not intended to reflect in any way upon the appropriateness *vel non* of compensation provisions in the direct sale situation presented in the instant case.

distributor has to increase its rates to its remaining customers in order to recover the fixed costs for investments formerly recouped through revenues from the sales discontinued because of curtailment.

If the gas available to a pipeline's distributor customers were allocated among them on a uniform basis, then all such distributor customers and the ultimate consumers to whom they resold their gas would bear the economic burdens resulting from the gas shortage proportionately. However, as illustrated by the situation on the Transco system to which the Commission makes repeated reference and with which the North Carolina Distributors are directly and immediately concerned, allocation of the available gas supply on a non-ratable basis, such as the Commission's so-called end-use approach, would result in substantially disparate economic impacts among the customer distributors and their ultimate consumers.

Since Transco extends from the South Gulf Coast area of Texas, through the Southern and Eastern Seaboard states up to the New Jersey and New York metropolitan areas, the areas through which it passes differ markedly in numerous respects, including but not limited to climate, density of population, nature and size of markets, industries and economic development. As a result, the marketing profile of each of Transco's distributor customers depends upon the mix of climate, population density and industrial development prevailing in its particular marketing area.

Accordingly, allocation of the gas among Transco's distributor customers on the basis of the use to which their ultimate consumers put the gas as contemplated by the Commission's so-called end-use approach results in widely disparate levels of curtailment among such distributor customers. For example, the evidence in the Transco proceeding (Exh. 116 in RP72-99) shows that allocation of Transco's gas supply (there assumed to be deficient by some 26%) among its distributor customers on the Commission's

end-use approach for the 1974-75 winter period results in curtailments ranging from a high of 73% to a low of 7%.

The same evidence indicates a curtailment of 43% for Piedmont, 34% for Public Service and 38% for North Carolina Natural for the 1974-75 winter period. This disparity in the impact upon the North Carolina Distributors is accentuated by the further facts that the curtailment on the Transco system is one of the deepest, if not the deepest, of all pipeline curtailments; that Transco is the North Carolina Distributors' sole source of gas for service in North Carolina; and that many of Transco's other customers, particularly those in the Northeast, have at least one additional supplier and some have two or more. Cf. *Consolidated Edison Co. v. F.P.C.*, 511 F.2d 372, 379-380 (D.C. Cir. 1974).

Compensation provisions, which would mitigate the disproportionate impact of such disparate curtailment upon distributor customers and their ultimate consumers clearly would further the purposes which this Court had in mind in construing the Act as vesting curtailment authority in the Commission, *i.e.*, to avoid a "seriously inequitable system of gas distribution" and to prevent "inequity and hardship" as a result of curtailment (406 U.S. at 632). In such circumstances, the inclusion of such compensation provisions clearly is appropriate and, indeed, may be necessary, to render the plan "just and reasonable," within the meaning of Section 4(a) of the Natural Gas Act and to avoid undue preference and discrimination within the meaning of Section 4(b).[10]

---

[10] See in *Rhode Island Consumers' Council v. F.P.C.*, 504 F.2d 203, 208 (D.C. Cir. 1974):

> "We perceive some merit in the contention that an approach that is blind to the differing degrees of hardship disruption of service may impose on different customers may constitute an unreasonable abandonment of reasoned inquiry merely for the sake of a convenient 'rule of thumb.' "

Moreover, as an "appropriate pragmatic adjustment * * * called for by particular circumstances" (406 U.S. at 642), compensation provisions come within "a generous construction of [the Commission's] statutory authority" as indicated by "the Commission's broad responsibilities" with respect to curtailment (*Ibid.*). Compensation provisions thus further the objectives of the Act as construed in *Louisiana Power & Light*, and, accordingly clearly fit within the Commission's authority as determined in that case.

II. COMPENSATION PROVISIONS ARE NOT PROHIBITED BY THE RATE OR CERTIFICATE PROVISIONS OF THE ACT

The Court of Appeals properly held not only that the Commission's curtailment authority extends to the inclusion of compensation provisions as just demonstrated, but also that such authority is not negated by other provisions of the Natural Gas Act.[11]

A. Compensation Provisions Do Not Involve "Rates" Within Sections 4 and 5

Contrary to the Commission's assertions, compensation provisions neither involve the establishment of rates within Sections 4 and 5 (Pet., p. 11) nor require a restructuring of pipeline rates (Pet., pp. 10, 12). Rather, compensation provisions are just what the words indicate them to be and nothing more, *i.e.*, compensation provisions which are a part of a plan for allocating a pipeline's limited gas supply and designed to mitigate hardship and inequity.

[11] Even if the Commission's arguments in this regard were sound as a legal matter (which they are not, as shown in the text), it would mean at most that there would be additional requirements to satisfy. It would not *per se* preclude the existence of authority in the Commission to permit the inclusion of compensation provisions in curtailment plans.

Their only similarity to rates is that they both may involve a transfer of funds. Such limited similarity, however, does not justify, much less require, the conclusion urged by the Commission. As summarized by the Court of Appeals (Pet. App., pp. 10a-11a):

> "The essential problem is that the Commission defines 'rates' too broadly. * * * It seems to us * * * that compensation payments are not 'rates' but in the nature of surcharges imposed in the context of a curtailment plan to insure that the burdens of curtailment are spread evenly and equitably among those affected by such plans. Thus, the basis for the imposition of such charges is not the rate setting jurisdiction of the Commission but rather is the transportation jurisdiction of the Commission. * * *"

That "rates" as used in the Natural Gas Act does not extend to compensation provisions included in curtailment plans is reinforced by the principle that since the Natural Gas Act does not provide a definition of "rates," the word is to be construed in a manner best designed to effectuate the regulatory purposes and objectives of the Natural Gas Act. *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965) and cases there cited; *Mobil Oil Corp. v. F.P.C.*, 463 F.2d 256, 259 (D.C. Cir. 1972), *cert. denied*, 406 U.S. 976 (1972).

So viewed, compensation payments clearly do not constitute "rates" since the contrary reading would frustrate the purposes of the Act by unduly restricting the flexibility needed to devise effective means to cope with the novel and complex problems resulting from the gas shortage.[12] As

[12] The propriety of such a result is further reinforced by the fact that in *Lousiana Power & Light*, this Court also agreed, *inter alia*, with the Commission's finding in *United Gas Pipe Line Company*, 46 FPC 786 (1971) that compliance with Section 7(b)'s abandonment provision generally is not required in connection with curtailment proceedings,

shown elsewhere herein, compensation provisions constitute a means of coping with some of the harshness and inequities caused by curtailment.

In this regard, as the Court of Appeals also noted (Pet. App., p. 11a), compensation payments are analogous to penalty payments, which the Commission has recognized as not constituting "rates" and in connection with which it has not undertaken to apply the "cost of service" standard, which it is here pressing as a barrier to the propriety of compensation provisions. See *e.g., Panhandle Eastern Pipeline Co.*, 46 FPC 1142, 1145 (1971); 47 FPC 1567, 1569 (1972); *United Gas Pipe Line Co.*, 50 FPC 1348, 1369 (1913); *El Paso Natural Gas Co.*, 51 FPC 2053, 2066 (1974).

Just as the Commission approved increases in the overrun penalties in these cases not on the basis of cost of service but as "appropriate in light of the supply situation and the prices of alternate fuels reflected therein" (see *El Paso Natural Gas Co., supra* at 2066), so also the gas supply shortage and the potential of the corollary curtailment plans for causing widely disparate adverse impact similarly require that the Commission's curtailment authority be held to include compensation provisions uncontrolled by the cost of service standard pressed by the Commission.[13]

---

even though the result of the curtailment is a reduction in service (406 U.S. at 645-6).

[13]The cost of service standard invoked by the Commission (Pet., pp. 12-13) as a further obstacle to compensation provisions is irrelevant. That standard applies to the *total* revenues received by a pipeline company in connection with the *totality* of its jurisdictional sales. It is inapplicable to compensation provisions since they would be a "wash" as far as the pipeline company is concerned and hence would have no effect upon its total jurisdictional revenues. To the extent that the validity of compensation provisions may be read as involving any rate making principles, it would be those relating to the fixing of individual rates, *i.e.*, rate design, and in this respect it is established that fairness and equity in the circumstances are of greater importance. (See, *e.g.*, *Colorado Interstate Gas Co. v. F.P.C.*, 324 U.S. 581, 589 (1945).

B. Compensation Provisions Do Not Constitute "Sales" Requiring Certificates Under Section 7 or Tariff Filings Under Section 4

There, likewise, is no merit to the Commission's claim (Pet., pp. 14-15) that compensation provisions would necessarily result in "sales for resale in interstate commerce" for which certificates under Section 7 and tariff filings under Section 4 would be required. As in the case of "rates" just discussed, the Act does not provide a definition of "sales" and adoption of the Commission's construction would frustrate the Act's purpose by making it all the more difficult for the Commission to deal with the problems caused by the gas shortage.

Moreover, it is clear, as a factual matter, that the curtailment plan in the *Transco* proceeding to which the Commission refers in this connection (Pet., p. 15), does not involve any "sales" or "brokering" of gas. Contrary to the Commission's implications (Pet., p. 15), that plan makes no provision for the shifting of gas by or among Transco's customers during the period that the plan was in operation. Rather, the curtailment plan provides for fixed entitlements of gas for each of Transco's customers for both the winter and summer seasons covered by the plan, with the only adjustments in such fixed entitlements contemplated being those required to reflect changes in Transco's gas supply. Such adjustments are shared among Transco's several customers in accordance with a formula for determining each customer's entitlement from Transco specifically prescribed by the plan.

Not only is there no foregoing of gas by some customers or acquiring of gas by other customers under the Transco plan, but the compensation provided is not paid by one customer to another. Rather, the matter is handled by debits and credits in Transco's bills to these customers, with no one customer's bill computed in relation to another customer's bill. The determination of credits and debits, made solely by Transco, is based upon systemwide considerations, not those

of individual customers and it would be an extreme coincidence if one customer's credits equalled another debits. Thus, nothing either in the way of gas or in money passes from one customer to another during the operation of the plan. Each customer receives the gas to which it is entitled under the plan without reference to the deliveries by Transco to any other customer. And, for the gas which it receives, each customer pays its bill to Transco in accordance with Transco's tariff, including the provisions as to debits and credits.

Plainly, therefore, for the period of the plan, there are no gas transactions which even remotely resemble "sales of gas for resale in interstate commerce," within the Act, necessitating compliance with the requirements of Section 4 and Section 7(c).

III. COMPENSATION PROVISIONS MITIGATE RATHER THAN FOSTER DISCRIMINATION

Finally, there is no substance to the Commission's additional contention (Pet., pp. 13-14) that "rates resulting from compensation schemes would necessarily be unduly discriminatory, contrary to Section 4(b) of the Act." Apart from the fact, as shown *supra*, pp. 12-14, that compensation provisions do not constitute rates, it is clear, as shown *supra*, pp. 8-12 that, far from fostering discrimination, compensation provisions, properly utilized, operate to mitigate the discrimination which would otherwise result, particularly to distributors, from the disparate impact of end-use curtailment. Accordingly, the anti-discrimination requirements of Section 4(b) (which provide the substantive standards for evaluating curtailment plans (see *supra*, p. 7)) support, rather than prohibit, compensation provisions.

The Commission's contrary arguments reflect a failure fully to analyze the operation of the Transco curtailment plan, on which these arguments are based. In the first place, the Transco plan does not result in "the pipeline '* * * charg[ing]

different rates to similarly situated customers * * *' " (Pet., p. 14). The fact of the matter is that distributor customers similarly situated as to both gas entitlements and curtailment levels are treated exactly alike and hence do not pay different "rates." As the Commission apparently recognizes (Pet., p. 14), the allegedly different "rates" occur only when there are differences in curtailment levels and hence different situations.

Secondly, under the Transco plan, all ultimate consumers to be served are for the most part *at or above comparable priorities*. Indeed, the basic thrust of the Commission's whole end-use approach is that the pipeline's available gas be allocated among its distributor customers so that only ultimate consumers at or above comparable priorities are served regardless of the particular marketing profile or ultimate consumer mix of the pipeline's various distributor customers.

Finally, and most important, at the same time that the Commission's end-use approach is designed to serve ultimate consumers at or above comparable priorities, regardless of the marketing profile of the distributor, such an approach operates to subject the distributors to varying levels of curtailment due to differences in marketing profile and ultimate consumer mix. See also, *supra*, pp. 10-11.

As a result, absent compensation provisions, a distributor with a below-average high priority load would be curtailed in excess of system average; hence in order to recoup costs formerly recovered through sales discontinued because of curtailed gas supply, it would have to increase its rates to its high priority customers (the only ones still being served) *more* than would be required under ratable curtailment. On the other hand, a distributor with above-average high priority loads would be curtailed below system average; as a result the rate increase to which it would have to subject its high priority customers (also the only ones still being served) in order to recoup costs formerly recovered through discontinued sales would be *less* than would be required under ratable curtailment.

Thus, although all ultimate consumers served by a pipeline's various distributor customers would be at or above comparable priorities of curtailment, those served by distributors subjected to above-average curtailment would, in the absence of compensation provisions, be subjected to greater rate increases and hence would be penalized in favor of those being served by distributors enjoying below average curtailment and subjected to far smaller, if any, rate increases. Consequently, far from operating to "penalize high priority users for the benefit of low priority users" as the Commission urges (Pet., p. 14), compensation provisions serve to mitigate the disparate impact upon distributors and their ultimate consumers at or above comparable priorities, thereby avoiding the unfairness and unreasonable discrimination which would otherwise result.

The foregoing also demonstrates the invalidity of the Commission's additional assertion that compensation provisions would "operate inconsistent [sic] with the approved objective of the Commission to base curtailment on end-use" (see Pet., pp. 15-17). Not only is the assumption (Pet., p. 16) underlying this argument unsound as just shown (*supra*, pp. 16-18), but the inclusion of compensation provisions in the Transco plan does not mean "incorporating a financial disincentive for high priority natural gas consumption" (see Pet., p. 17). Since the costs both of alternate fuels and of supplemental gas supplies are far greater than the compensation provided, the right to obtain additional pipeline gas is far more valuable to the distributors and their ultimate consumers than the compensation provided.

Any possible question in this regard is put to rest when it is remembered that the compensation provisions in the Transco curtailment plan referred to by the Commission (Pet., p. 16) were part of a settlement accepted by all but one of Transco's distributor customers and no distributor customer entitled to receive gas in excess of system average and without other pipeline gas manifested any interest or desire voluntarily to give up such additiona' gas in order to avoid the compensation provided. By the same token, each distributor

entitled to receive compensation would gladly give such compensation up if it meant obtaining additional gas. These considerations plainly highlight the invalidity, as a practical matter, of this Commission argument. Cf. *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151 (1934).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Dale A. Wright
1050 17th Street, N.W.
Suite 600
Washignton, D.C. 20036

Jerry W. Amos
P.O. Drawer U
Greensboro, N.C. 27402

Of Counsel for
Piedmont Natural Gas
Company, Inc.

Melvin Richter
Littman, Richter, Wright
& Talisman, P.C.
1050 17th Street, N.W.
Suite 600
Washington, D.C. 20036

Attorney for
Piedmont Natural Gas Co., Inc.
Public Service Company of North
Carolina and North Carolina
Natural Gas Company

F. Kent Burns
P.O. Box 1406
Raleigh, N.C. 27602

Of Counsel for
Public Service Company of North Carolina

Donald W. McCoy
222 Maiden Lane
P.O. Box 1688
Fayetteville, N.C. 28302

Of Counsel for
North Carolina Natural Gas Corporation

July 14, 1976